UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

ISLAND WASTE SERVICES, LTD.
Employer[1]

and Case No. 29-RC-10206

LOCAL 813, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Island Waste Services, Ltd. ("the Employer") is engaged in the business of waste handling and recycling in Nassau and Suffolk Counties, New York. Local 813, International Brotherhood of Teamsters, AFL-CIO ("the Petitioner") currently represents four separate bargaining units of the Employer's employees, including commercial chauffeurs and helpers; residential chauffeurs and helpers; mechanics and welders; and transfer station employees. On April 27, 2004, the Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent a "residual" unit of all unrepresented employees, specifically including container painters, building service employees, scale house operators and container retriever/delivery drivers, and excluding only office clerical employees, guards and supervisors. The Employer contends that the petitioned-for unit is not an appropriate unit, residual or

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1 The Employer's name appears as amended at the hearing. (See Board Exhibit 2.)
References to the record will hereinafter be abbreviated as follows: "Bd. Ex. #" refers to Board exhibits, and "Jt. Ex. #" refers Joint exhibits.

otherwise. A hearing was held before Nancy Lipin, a hearing officer of the National Labor Relations Board.

For reasons described in more detail below, I find that the petitioned-for unit is an appropriate residual unit.

Facts

The Employer is engaged in waste handling and recycling in Nassau and Suffolk Counties, New York. The Employer's drivers (chauffeurs) pick up waste from both commercial and residential customers throughout the two counties. They work out of two facilities, one in Hicksville (Nassau County) and one in Holtsville (Suffolk County). The two facilities are located 30 miles apart from each other. The Employer also has a corporate office building in Hicksville, which is located approximately one-quarter of a mile from the Hicksville facility.

The Petitioner currently represents the following four bargaining units of the Employer's employees:

(1) One unit of commercial chauffeurs and helpers employed in both Nassau and Suffolk Counties. There was a collective bargaining agreement, effective from September 1, 2000, through August 31, 2003 (Jt. Ex. 1). The parties then executed a Memorandum of Agreement, extending the contract with some modifications, effective from September 1, 2003 through August 31, 2006 (Jt. Ex. 5).

(2) One unit of residential chauffeurs and helpers employed in both Nassau and Suffolk Counties. There was a collective bargaining agreement, effective from January 1, 2001, through December 31, 2003 (Jt. Ex. 2). The parties stipulated that the contract has been extended, pending their negotiations. (See Bd. Ex. 2.) Although the contract makes reference to the five boroughs of New York City, there seems to be no dispute that the Employer operates only in Nassau and Suffolk Counties.

(3) One unit of mechanics, mechanics' helpers, welders and welders' helpers employed at both the Hicksville and Holtsville facilities. There was a collective bargaining agreement, effective from July 1, 2000 through August 31, 2003 (Jt. Ex. 3), which was extended and modified by the same 2003-2006 Memorandum of Agreement covering the commercial chauffeurs and helpers described above (Jt. Ex. 5).

(4) One unit of transfer station employees -- including pickers, sorters, forklift operators, heavy equipment operators, machine operators, traffic controllers, bailers and laborers -- employed at the Employer's transfer station in Holtsville. There is a collective bargaining agreement in effect, from June 1, 2001 through May 31, 2004 (Jt. Ex. 4).

There is also a bargaining unit represented by another union, Local 210, Warehouse and Production Employees Union, AFL-CIO ("Local 210"). It is not clear from the record which employees Local 210 represents. There is a collective bargaining agreement, apparently effective from September 1, 2001, through August 31, 2006 (Jt. Ex. 6), which describes the unit as "all union employees in its [the Employer's] employ, excluding executives, supervisors, armed guards, office and clerical employees." Local 210 has stated that it has no interest in representing the employees involved in the instant case. (See Bd. Ex. 3, disclaimer letter.)

There are only six non-supervisory employees in the Employer's waste handling and recycling operations, excluding office clerical employees, who are not represented by either of these labor organizations. (No party has contended that office clerical employees should be included in any unit or units found appropriate.) They include: two container retriever/delivery drivers (one in Hicksville and one in Holtsville) who deliver and retrieve empty garbage containers to and from customers; two container painters (one in Hicksville and one in Holtsville); one building service employee who cleans the Employer's corporate office in Hicksville; and a scale room operator who works in a trailer at the Holtsville transfer station, and whose duties include weighing the trucks.

The parties' positions and offers of proof

The Petitioner seeks an election among the six unrepresented employees described above, who the Petitioner claims are "residual" to the existing bargaining units. The Petitioner also expressed its willingness to proceed to an election in any unit or units found appropriate herein.

The Employer essentially contends that the six unrepresented employees have no community of interest or "cohesiveness" with anyone -- neither with each other, nor with the existing units already represented by the Petitioner. Specifically, when asked for an offer of proof, the Employer pointed to the geographical distances between some of the petitioned-for employees (up to 30 miles apart at the Hicksville and Holtsville facilities), the differing types of work performed by the petitioned-for employees, their differing supervision, the lack of interchange between them, and other factors. Based on these factors, the Employer argues, the petitioned-for employees do not belong in any bargaining unit. Although the Employer has not expressly moved to dismiss the petition, its multiple contentions would effectively preclude the unrepresented employees from ever having the opportunity to choose whether to be represented for collective bargaining purposes.

The Employer further contends that the Petitioner verbally agreed, as part of the negotiations for the 2003-2006 Memorandum of Agreement covering the commercial drivers/helpers and the mechanics/welders' units, not to seek to represent the petitioned-for employees. A side letter agreement attached to the MOA states that certain changes to Article 26 are "not intended to affect container delivery drivers who are not in the bargaining unit" (Jt. Ex. 5). As part of an offer of proof, the Employer's attorney stated

that his witnesses would testify that the parties came very close to a strike during the 2003 negotiations; that the Petitioner expressly promised not to organize the petitioned-for employees; and that the Employer would not have signed the 2003-2006 Memorandum of Agreement if not for the Petitioner's promise. Although the Employer did not offer into evidence any written agreement to that effect, the Employer argues that the side letter of agreement confirms this agreement "in part" by showing that the parties agreed to exclude the container retriever/delivery drivers.

Finally, the Employer contends that the scale room operator is a confidential employee. As part of its offer of proof, the Employer asserted that the scale room operator checks the weights which the drivers claim to have; that he handles cash and important records regarding the weights and money owed; that there have been scandals in the waste industry where scale operators conspire with drivers to cheat government entities out of money; that part of the scale room operator's job is to oversee the drivers' weights and therefore that he must not be in the same unit as drivers.[2]

At the hearing, the Hearing Officer elicited some brief testimony to describe the existing bargaining units, the petitioned-for classifications, and to establish that the petitioned-for classifications encompassed all of the remaining unrepresented employees, other than the office clerical employees. The Hearing Officer allowed the Employer's attorney to make offers of proof regarding its contentions, as described above. However, the Hearing Officer ultimately rejected the Employer's offers of proof, and precluded the Employer from adducing any evidence regarding these issues.

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[2] In its post-hearing brief, the Employer also argues for the first time that the scale room operator is an office clerical employee, and that the petitioned-for unit is not truly "residual" if it includes some, but not all, of the unrepresented office clerical employees.

Discussion

Although the Board has a duty to ensure due process and to provide "an appropriate hearing" under Section 9(c)(1) of the Act, the Board also has a duty to protect the integrity of its processes against an unwarranted burdening of the record and unnecessary delay, and promptly to resolve questions concerning representation. Bennett Industries, Inc., 313 NLRB 1363 (1994); HeartShare Human Services of New York, Inc., 320 NLRB 1 (1995); Mariah, Inc., 322 NLRB 586 (1996). Thus, for example, when evidence proffered in an offer of proof is insufficient to rebut the appropriateness of a presumptively-appropriate, petitioned-for unit, this agency is not required to allow full-blown litigation of the issue. Laurel Associates, Inc., d/b/a Jersey Shore Nursing and Rehabilitation Center, 325 NLRB 603 (1998). In the instant case, although the petitioned-for unit is not "presumptively" appropriate, I find that the evidence proffered by the Employer in its offers of proof (even if assumed to be true) would not support the conclusions that the Employer contends it supports. I therefore find that the Hearing Officer struck the proper balance between the parties' right to due process and the agency's duty to avoid delay and unnecessary burdening of the record.

Specifically, as for the residual unit issue, the Employer's arguments completely miss the mark. A residual unit does not need to have the same "cohesiveness" that a proposed unit would require in first-time organizing, where no employees are represented. Rather, where a portion of a workforce is already represented, the Board may allow a "residual" bargaining unit as a catch-all, to allow representation for various employees who (for whatever reason) have not been included in the existing bargaining unit or units. Otherwise, those employees might be forever precluded from choosing

whether to participate in collective bargaining, a result which is clearly at odds with employees' Section 7 rights. A residual unit is considered appropriate if it includes all unrepresented employees of the type covered by the petition. Fleming Foods, Inc., 313 NLRB 948 (1994); Carl Buddig and Co., 328 NLRB 929 (1999); G.L. Milliken Plastering, 340 NLRB No. 138 (2003).

For example, in Cities Service Oil Co., 200 NLRB 470 (1972), the employer's natural gas liquids operation division contained a total of 41 facilities: 37 gas-operating plants and 4 non-production facilities for storage or maintenance. The petitioner in that case (Oil, Chemical and Atomic Workers) already represented employees at 24 of the gas-operating plants, and a Teamsters local also represented employees at one plant. The petitioner filed a petition to represent employees at the remaining 16 unrepresented facilities, including some non-production facilities with only one unit employee each. The employer argued that the only appropriate units were separate units at each facility. However, the Board found appropriate a "residual" unit of all the unrepresented employees, in part because having separate units would "permanently deny" employees at the one-employee facilities "any opportunity" to choose whether to participate in the collective bargaining process. Id. at 471.

In Eastern Container Corp., 275 NLRB 1537 (1985), one union (IUE) already represented production employees at the employer's plant. The petitioner (Teamsters) filed a petition to represent 8 maintenance employees. The IUE had no interest in representing the maintenance employees. There were no other unrepresented employees at the plant, except for some sales employees and administrative employees, whom the parties apparently agreed to exclude. The employer argued that the only appropriate

unit would consist of an overall production and maintenance unit. However, the Board held: "As the maintenance employees are the only unrepresented employees who could appropriately be included in the production unit, and the IUE does not seek to represent them, we find the petitioned-for unit appropriate as a residual unit, whether or not the maintenance employees enjoy a separate community of interest from the production employees." Id. at 1538. In other words, since the maintenance employees had not been included in what would have been a traditional production and maintenance unit, they were "residual" to the existing production unit.

In Fleming Foods, *supra*, Teamsters Local 384 already represented certain warehouse employees, including 2 warehouse janitors. Another union, Teamsters Local 500, sought a unit limited to 8 full-time warehouse clerical employees, but excluding 2 part-time warehouse clerical employees and 4 other maintenance employees. (It is not entirely clear how the 4 other maintenance employees differed from the 2 warehouse janitors, other than that they may have cleaned the whole facility.) The employer argued that the only appropriate unit would be a residual unit consisting of the 14 unrepresented warehouse clerical employees (both full- and part-time) and maintenance employees. The Board agreed. First, the Board found that the petitioned-for unit was too narrow, because it made no sense to exclude part-time warehouse clerical employees who perform the same work as the full-time warehouse clerical employees. Further, the Board found that, since the 10 warehouse clerical employees did indeed have a community of interest with Local 384's warehouse unit, it would not be appropriate to have them stand alone as a separate unit, but Local 384 had no interest in representing them. Thus, the Board concluded that the petitioner (Local 500) could represent the

warehouse clerical employees *only* as part of a residual unit consisting of all the unrepresented warehouse and maintenance employees. (Office clerical employees were excluded.) Thus, although Local 500's petition initially sought only the full-time warehouse clerical employees, the Board found that the only appropriate unit was a "residual" unit including all the unrepresented warehouse and maintenance employees (i.e., residual to Local 384's existing warehouse unit), excluding office clericals.

Clearly, in a case such as Fleming Foods, a unit of the 10 warehouse clerical employees and 4 maintenance employees would not have been considered appropriate as a stand-alone unit in an initial organizing context, where no other employees were already represented. However, the Board allows such residual units as a catch-all, to encompass unrepresented employees who for whatever reason were excluded from the existing units and who otherwise might not have an opportunity to choose collective bargaining.

In the instant case, no one would argue that the Employer's container drivers, container painters, scale room operators and building service employees would be appropriate as a stand-alone unit in an initial-organizing context. As the Employer asserts, they have no "cohesiveness" as a group, in and of themselves. However, it is obvious from the record that the petitioned-for unit encompasses all of the Employer's unrepresented employees of the traditional production and maintenance type. I therefore conclude that this is an appropriate unit, residual to the existing units represented by the Petitioner and Local 210. Furthermore, to hold otherwise might permanently deny the sole building service employee and the sole scale room operator any opportunity to participate in collective bargaining.

The Employer's argument regarding the Petitioner's alleged agreement not to seek the petitioned-for employees also is not on point. The Board has held that when a union has contractually agreed not to represent certain categories of employees, that contract will bar an election among those employees for that union during the contract term. Briggs Indiana Corp., 63 NLRB 1270 (1945). However, it is well established that the Briggs Indiana rule applies only when the union has *expressly* promised not to seek representation of those employees, or not to accept them into membership. Cessna Aircraft Co., 123 NLRB 855 (1959); Budd Co., 154 NLRB 421 (1965). Such a promise will not be implied from a mere unit exclusion, or from any alleged "understanding" between the parties during contract negotiations. Cessna Aircraft, supra, 123 NLRB at 857. Thus, absent an express written promise not to seek to represent certain employees in this case, the Employer cannot exclude them on that basis, and the Hearing Officer did not need to allow testimony regarding any alleged understanding or verbal agreement.

Finally, the Employer's argument that the scale room operator is a confidential employee is not persuasive. The Board defines confidential employees as those who "assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." B.F. Goodrich Co., 115 NLRB 722, 724 (1956), approved in NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170, 108 LRRM 3105 (1981). The Board has developed a very limited definition of confidential employees. Inland Steel Company, 308 NLRB 868, 872 (1992). First, the definition applies only to those who assist *managerial* employees, not those who assist mere supervisors. Ford Motor Co., 66 NLRB 1317

(1946). Second, as indicated above, the manager must exercise managerial functions *in the field of labor relations*, the so-called "labor nexus" test. B.F. Goodrich, *supra*. Furthermore, although in some earlier cases the Board excluded any employee who worked closely with a labor-relations manager, *e.g.* B.F. Goodrich, *supra*, and Prince Gardner, 231 NLRB 96, 97 (1977), in subsequent cases the Board conducted a more detailed review of the exact information to which the assistant has access. It is well settled that mere access to confidential personnel files and documents, the mere preparation of statistical data to be used in contract negotiations, and the mere retrieval of personnel information to be used by management for grievance handling, do not render an employee confidential within the Board's narrow definition. The Bakersfield Californian, 316 NLRB 1211 (1995); Inland Steel, *supra*, and cases cited therein at p. 877. Rather, under these cases, an employee will be excluded as confidential only if her close working relationship with a manager causes her to be entrusted with information regarding labor policy formulation (such as bargaining proposals and strategies), the disclosure of which could impair the manager's ability to deal with the union.

In this case, the fact that the scale room operator weighs the drivers' truck has nothing whatsoever to do with any "confidential" information as described above. It was obvious that the Employer's proffered evidence, even if assumed to be true, would in no way demonstrate that the scale room operator was a confidential employee. I therefore find that the scale room operator is not a confidential employee, and affirm the Hearing Officer's decision to preclude evidence on that issue.

In sum, I find that the petitioned-for unit of unrepresented employees, including container painters, building service employees, scale house operators and container

retriever/delivery drivers, but excluding office clerical employees, is an appropriate residual unit for the purposes of collective bargaining.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, including the parties' stipulations and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that Island Waste Services, Ltd., is a domestic corporation with its principal office and place of business located at 344 Duffy Avenue, Hicksville, New York. It is engaged in the business of waste handling and recycling. During the past year, which period is representative of its annual operations generally, the Employer purchased and received at its New York facilities, goods and materials valued in excess of $50,000 directly from points outside the State of New York.

The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner, a labor organization, claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. I find that the following employees will constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time container painters, building service employees, scale house operators and container retriever/delivery drivers

employed by the Employer at its facilities in Hicksville and Holtsville, New York, excluding office clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Local 813, International Brotherhood of Teamsters, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the

election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **June 2, 2004.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by

facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **June 9, 2004.** The request may **not** be filed by facsimile.

Dated: May 26, 2004.

/S/ ALVIN BLYER

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